

SOUTH AFRICA / JUDGMENT

# Makhoba v S (AR 397/12) [2013] ZAKZPHC 43 (20 August 2013)

[2013] ZAKZPHC 43

## COURT

Kwazulu-Natal High Court, Pietermaritzburg

## BEFORE

Van Zyl, Ntshangase, Ndlovu

## CASE / FILE NUMBER

AR 397/12

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IN THE HIGH COURT OF  
SOUTH AFRICA  
KWAZULU-NATAL,  
PIETERMARITZBURG  
CASE No : AR 397/12

In the appeal of:

MHLEPHETHWE MZOTHULE

MAKHOBHA

.....Appellant

and

THE STATE

.....Respondent

## JUDGMENT

VAN ZYL, J:

The appellant and the late Mr Khumbulani Mfihlo Hlengwa (the deceased) were, during the latter's lifetime, at odds with each other. At all material times the deceased was a shopkeeper conducting trade as Mbizeni Store in the Kranskop district of KwaZulu-Natal and he, the appellant, as well as the state witnesses were all local residents and well known to each other.

At some stage prior to the latter part of the year 2001 the deceased's shop was broken into and he blamed the appellant and others for this incident. Discussions followed and an understanding was reached in terms of which the appellant would compensate the deceased for his losses sustained. However, so it was alleged, the appellant failed to honour his commitments in this regard and this gave rise to a degree of ill-feeling not restricted to the appellant and the deceased

only, but variously described as a “feud” also involving their respective clans, namely the Makhoba’s and the Hlongwa’s.

On 1 November 2001 an incident occurred in the vicinity of the Mbizeni Store which was a product of this ill feeling. The appellant and one BonginkosiMajozi produced handguns and fired at the deceased, his brother the state witness MuziwenhlanhlaKholwaHlongwa and another brother called Bheki. In the process the deceased was injured when he was shot in the buttock. This incident ultimately gave rise to the charge of attempted murder upon which the appellant, despite his plea of not guilty, was convicted and sentenced to ten(10) years’ imprisonment. Neither this conviction nor the sentence is the subject of the present appeal.

This appeal concerns the sentence of imprisonment for life imposed upon the appellant by the trial court in respect of count 2, namely the murder of the deceased which occurred on 16 January 2004 in the same area in the district of Kranskop. It was common cause that during the evening in question the appellant, the deceased, as well as the state witnesses Mlindeneni Leonard Hlongwa and Sihle Elliot Mhlongo met at the latter’s residence. The appellant had called in there on his way to his own home to see Sihle and then departed at the same time as Mlindeneni and the deceased, who were also leaving for their respective homes.

Whilst Mlindeneni and the deceased bypassed the adjoining residence of Sihle’s brother KhonzaSiphoMhlongo, who was also called by the state, the appellant stopped there with the object of usingKhonza’scellphone. He declined an invitation to join the family members who were having supper because, so he informed Khonza, the deceased had indicated that he wished to speak with him and the appellant then left. A while later an estimated two gunshots were heard.

The only state witness who gave evidence regarding the actual shooting was Mlindeneni who said he was walking on his way home with the deceased following some distance behind him and at a stage when they were about to separate and go to their respective homes. When he heard gunshots he turned and observed sparks from a handgun held by the appellant. Thereafter the appellant left, running back in the direction from which they came, whilst his brother the deceased staggered and fell. He approached the deceased to render assistance and then left him there and rushed off to seek help. According to the witness Khonza, he went to the adjoining residence of his brother Sihle after he heard shots and a while later the appellant arrived.

According to both these witnesses the appellant subsequently stated that he had shot “at” the deceased and Sihle elaborated that the appellant had said that the shooting concerned the dispute between the Hlongwa’s and the Makhoba’s, but that they should not concern themselves with that. The appellant, in his own evidence claimed that he shot the deceased in self defence. This he explained wasat a stage when the deceased, having reproached him for shooting at him during the 2001 incident when the deceased was injured in the buttock, reached for his own firearm in order to shoot at the appellant. The Court a quo rejected the appellant’s reliance upon self defence and held that the appellant intentionally shot and killed the deceased.

In sentencing the appellant the Court a quo held that the killing of the deceased was “planned and premeditated” and accordingly that the murder of the deceased fell into the category contemplated in Part I of the Schedule 2 of the Criminal Law Amendment Act 105 of 1997 (the Act). As such the conviction attracted a minimum sentence of imprisonment for life, unless the court found substantial and compelling circumstances which justified the imposition of a sentence of less than the prescribed minimum. In a brief judgment on sentence the court a quo found no substantial and compelling circumstances, concluded that the imposition of the prescribed minimum of life imprisonment would not be unfair or unjust and sentenced the appellant accordingly.

At the outset Mr De Wet who appeared for the respondent before us submitted that the trial court, in convicting the appellant on Count 2, had held that the murder was planned and premeditated and that subsequently the appellant was only granted leave to appeal against the sentence imposed on Count 2. Accordingly, so counsel submitted, it was not open to this court on appeal to reconsider the issue of premeditation because this formed part of the conviction. Counsel accordingly submitted that this court was bound to consider the appeal against the sentence imposed upon the basis that the murder fell into Part I of Schedule 2 to the Act.

In support for this submission counsel relied upon the decision in *Alpheus Malulek v The State* (CA 20/2008) [2008] ZANWHC 23 of 4 August 2008 in paragraph 2 where Landman, J., delivering the judgment of the Full Court of that Division, stated that –

*“As a finding of premeditation relates to the form of the crime it must be decided when the verdict is delivered. Once the finding has been made, it is not open to challenge if the appeal is only against sentence.”*

The relevant portion of Part I of Schedule 2 of the Act provides that the offence of murder falls into this category when, inter alia, “(a) it was planned or premeditated;”. Failing that murder resorts under Part II of Schedule 2 of the Act which provides for “Murder in circumstances other than those referred to in Part I.” which then attracts a minimum sentence of 15 years’ imprisonment.

In the present matter the reasoning of the trial court with regard to the conviction of the appellant on Count 2 was relatively brief. In the main it concerned an evaluation of the appellant’s claim to have acted in defence of his person against the threat of harm to him from the deceased. The trial court, in rejecting this defence, held that the state had proved that the appellant had “... unlawfully and intentionally killed the deceased” and that he was accordingly guilty of murder as charged in Count 2. But in convicting the appellant the trial court did not deal with or express itself on the issues of planning or premeditation. It was only at the sentence stage where, in the opening line of a brief judgment on sentence, the Court a quo stated that the murder was planned and premeditated.

Counsel for the respondent submitted that a finding of preplanning and premeditation as part of the conviction must be inferred from the fact that the trial court convicted the appellant on Count 2 “as charged” and that in the indictment the charge of murder on Count 2 was framed as “Murder, read with Schedule 2, Part 1(a) of Section 51 of Act 105 of 1997”(sic). Properly construed, so counsel submitted, the charge was one of a murder which was pre-planned and premeditated and that the appellant was convicted accordingly.

Flowing from the submissions by counsel for the respondent, two different approaches to the appeal present themselves. In the first instance and if the Court a quo is held to have convicted the appellant on the basis that the murder was planned and premeditated and fell into the category of a murder as contemplated in Part I of Schedule 2 of the Act, then a minimum sentence of imprisonment for life is indicated unless there are substantial and compelling circumstances present which justify the imposition of a lesser sentence. The issues on appeal before us then encompass whether on the facts of the matter there are such substantial and compelling circumstances and whether the Court a quo was correct in nevertheless imposing the prescribed minimum of life imprisonment.

In the second instance and if the Court a quo is held not to have convicted the appellant on the basis that the murder was planned and premeditated, then it fell into the category of a murder as contemplated in Part II of Schedule 2 of the Act where the minimum sentence is one of fifteen(15) years’ imprisonment, unless there are substantial and compelling circumstances present which justify the imposition of a lesser sentence. Given that the trial court, in such an event imposed a sentence substantially in excess to the prescribed minimum, the issues on appeal would then be whether on the facts of the matter there are such mitigating factors so that, ignoring for the moment any misdirections or irregularities, it can be said that the sentence as imposed is disturbingly inappropriate, thus entitling this court to intervene on appeal (*S v Kent* 1981 (3) SA 23 (A)).

In my respectful view the Court a quodid not intend upon conviction to decide or make any definitive finding on the issue of whether the murder was planned or premeditated. As I understand the remarks of the learned trial Judge he was in regard to the conviction primarily concerned with an evaluation of the private defence relied upon by the appellant and he concluded that the common law elements of murder had been established beyond any reasonable doubt. Hence he found that the appellant unlawfully killed the deceased with the requisite intention required by law. That is also why, for purposes of conviction, he omitted any reference to the offence being planned and premeditated, but commenced his judgment on sentence with an express reference thereto.

But in the final analysis, whichever of the two approaches are adopted, the end result of the deliberations would probably give rise to similar outcomes.

Assuming that the finding of the trial court is to be construed as one in terms of which the minimum of life imprisonment applied, then there are in my view and against the background of events to which I have already referred, substantial and compelling mitigating factors to be identified. These include the following.

From the evidence it is common cause that there was a long standing feud involving the “Hlongwa’s” and the “Makhoba’s” generally and the appellant and the deceased in particular. The appellant also gave evidence that subsequent to the first incident giving rise to Count 1 herein, he himself was injured and hospitalised in a shooting forming part of the unrest flowing from the feud. Whilst rejecting his evidence on the issue of self defence in relation to Count 2, the trial court did not deal with or reject his evidence regarding the circumstances of his own earlier injury. Nor did the trial court appear to exclude the suggestion that the appellant had approached the deceased at the critical time intent upon a shootout with the deceased. Instead the trial court remarked that “That is not what self defence is about. The element of necessity involved in self defence is missing in this case.” It is also not without significance in this context that the victim in respect of both Counts 1 and 2, these counts being separated in time by just over two years, was the same individual.

The personal circumstances of the appellant at the time of sentence (27 March

2006) included that he was a 31 year old first offender, had been self-employed earning an income of about R500 per month and had been in custody from August 2004 to March 2006 (a period of about 20 months). He was single with no dependent children, but rendered support to his aged mother, as well as his four siblings.

It is unclear what exactly provoked the flare-up of trouble that particular night. From the record it would appear that the deceased, his brother Mlindenihlongwa and the appellant had independently arrived at the home of the witness SihleMhlongo and that the latter’s visitors had departed at approximately the same time, all on their way home after dark. The witness KhonzaSiphoMhlongo, a neighbour and brother of SihleMhlongo, confirmed that the appellant had then briefly called at his residence before departing because, so he said, the appellant informed him that he was in a hurry because the deceased still wished to speak to him. A while later the shooting followed and Mlindenihlongwa, the only eye witness thereto was walking ahead, followed by the deceased some distance behind. He did not observe the appellant catch up with the deceased, or hear what may have passed between them before hearing shots, turning and observing the appellant fleeing on foot in the direction from which they came. He then rushed to the assistance of the mortally injured deceased.

Assuming premeditation, it was not established that the appellant had the direct intention to kill the deceased. The State witnesses in the form of the brothers Sihle and KhonzaMhlongo (whose evidence the trial court accepted) merely stated that the appellant afterwards reported to them that he shot “at” (ie, in the direction of) the deceased. This suggests that the matter should be approached on the basis of *dolus eventualis* (or legal intention), as opposed to direct intention or a desire to kill in the form of *dolus directus*.

There are, of course, also aggravating factors present. Violent attacks and gun related crime was rife in the area. The premeditated commission of offences with an unlicensed firearm is also inherently serious, as is the reckless disregard for the sanctity of human life, even if the matter were approached on the basis of a legal intention to kill. The apparent lack of remorse by the appellant is also an important aggravating factor in all the circumstances.

The correct approach to minimum sentencing in terms of the provisions of the Act was authoritatively stated by Nugent J A in *S v Vilakazi* 2009 (1) SACR 552 (SCA) at page 560G – 561B in para 15, as follows -

*“...it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. The Constitutional Court made it clear (in Dodo) that what is meant by the 'offence' in that context ...*

consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.

If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence.”

It is clear that a court, in giving consideration to the existence or otherwise of substantial and compelling circumstances, would then also consider the traditional factors relevant to the determination of an appropriate sentence. These were restated by Mthiyane JA (as he then was) in *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (1) SACR 243 (SCA) at page 250H – 251A in para 13, as follows –

*“[13] The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the 'triad consisting of the crime, the offender and the interests of society'. In the assessment of an appropriate sentence, the court is required to have regard to the main purposes of punishment, namely, the deterrent, preventive, reformatory and the retributive aspects thereof. To these elements must be added the quality of mercy, as distinct from mere sympathy for the offender.'”*

In applying these traditional values to the consideration of an appropriate sentence it is also necessary to remember that where serious crimes are involved, the main purposes of punishment do not necessarily carry equal weight. In this regard Nugent JA remarked in *S v Swart* 2004 (2) SACR 370 (SCA) in para 12 that –

*“[12] What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.”*

Undoubtedly the killing of the deceased amounted to a serious crime calling for severe punishment. The only appropriate form for such punishment is by way of a long term of imprisonment. The real question, however, is whether a term of imprisonment for life, in all the circumstances of the matter, is not disproportionately severe. In my respectful view the question needs to be answered in the affirmative. That being so the trial court should have found that substantial and compelling circumstances existed which called for the imposition of a lesser sentence of imprisonment. The failure of the trial court to do so amounted, in my respectful view, to a misdirection which entitles and indeed obliges this court to intervene on appeal.

But even if the Court a quo were held to have convicted the appellant on the basis that the murder fell into the category as contemplated in Part II of Schedule 2 of the Act, thereby attracting a minimum sentence of fifteen(15) years' imprisonment and that it then imposed a more severe sentence by virtue of its common law jurisdiction, a consideration of the issues on appeal would in my view give rise to

much the same result.

Neither counsel suggested that there had been any material irregularity or misdirection in the proceedings before the trial court. However, Ms Khuzwayo who at short notice appeared for the appellant before us and to whom we are grateful for her efforts, nevertheless submitted that the sentence of imprisonment for life was so severe in all the circumstances of the case that a significant disparity would arise between the sentence so imposed and the sentence this court would otherwise have imposed. Accordingly, so counsel submitted, we would be justified in intervening on appeal (See: *S v Kent* (supra)). In my view the submission is sound. Whether one approaches the validity of the life sentence from the point of view of the statutory substantial and compelling circumstances, or from the common law vantage of undue severity, the ultimate conclusion remains that life imprisonment is disproportionately or unduly severe in all the circumstances of the case.

That is not to say that a moderate sentence is called for. The killing of a human being is always a serious matter and the murder of the deceased in the present matter is to be deplored. However, balancing the factors to which I have already referred, I agree with the submission of counsel for the appellant that a sentence of twenty(20) years' imprisonment on Count 2 would strike the correct balance and serve the purposes of punishment.

Interference on appeal with the sentence of life imprisonment on Count2, as imposed by the Court a quo, then requires us also to consider the cumulative effects of the sentence already imposed in respect of Count 1 and in respect of which no appeal lies, together with the sentence of less than life imprisonment to be imposed on appeal on Count 2. In practice the effect of a sentence of imprisonment which is imposed together with a term of life imprisonment, is that the former as a

matter of law runs concurrently with the life term. However, once two sentences of less than life are imposed, they are to be served

successively, unless the court determines that they are to run concurrently, either in whole or in part (s280(2) of the Criminal

Procedure Act 51 of 1977 (the CPA)).

The sentence of (10) years' imprisonment on the Attempted Murder in Count1 is not, as already indicated, subject to appeal. But the result of imposing on appeal, as I have suggested, a sentence of twenty(20) years' imprisonment on Count2 would then result in an effective term of thirty(30) years' imprisonment to be served by the Appellant. In my respectful view and in the circumstances of this case, such an effective term of imprisonment would be excessive and needs to be tempered in the interests of justice by directing that the two sentences run concurrently, either wholly or in part.

In view of the close relationship between the two offences, which were both committed against the background of an on-going feud involving the same aggressor and the same victim, as well as the fact that the appellant had spent some 20 months in custody awaiting trial, I respectfully consider that it would be proper to direct that the sentence on Count1 run entirely concurrently with the sentence (as imposed upon appeal) in respect of Count2, so that the effective term of imprisonment to be served by the appellant in respect of both these convictions is one of twenty(20) years' imprisonment. The provisions of s276B(2) of the CPA require of us, in such event, to determine the applicable non-parole period and in this regard I would propose that the non-parole period be determined at thirteen(13) years.

It is unclear why the present appeal has only now come before the court for consideration. It is disturbing to note that sentence was passed by the trial court as long ago as 27 March 2006, but that the application for leave to appeal only came before Jappie, J (as he then was) on 2 February

2012. In the light thereof I consider it appropriate that it be directed that the sentence thus imposed in respect of Count 2 be antedated in terms of the provisions of s282 of the CPA to 27 March 2006.

In the circumstances I would respectfully propose that an order be made, as follows –

The appeal against the sentence on Count 2 is upheld.

The sentence of life imprisonment, as imposed by the trial court on Count2, is set aside and the following sentence is substituted –

'(i) The accused is sentenced to twenty(20) years' imprisonment on Count 2, which sentence is antedated in terms of the provisions of s282 of the Criminal Procedure Act 51 of 1977 (the CPA) to 27 March 2006.

(ii) In terms of s280(2) of the CPA it is directed that the existing sentence of ten(10) years' imprisonment on Count 1 will run entirely concurrently with the sentence of twenty(20) years' imprisonment now imposed on Count 2, so that the effective period of imprisonment shall be twenty(20) years.

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VAN ZYL, J.

I agree. \_\_\_\_

NTSHANGASE, J.

I agree and it is so ordered. \_\_\_\_

NDLOVU, J.

APPEARANCES:

For the Appellant : Adv Ms Y N Khuzwayo,

Instructed by

the Justice Centre of the Legal Aid Board, Pietermaritzburg.

For the Respondent : AdvF van Heerden Instructed by

the Director of Public Prosecutions (KZN), Pietermaritzburg.

Judgment reserved : 7 August 2013

Judgment delivered : 20 August 2013

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